NO. 47116-7-II

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

DIVISION II

LEONARD C. DEWITT,

Appellant/Plaintiff

v.

SHAWN E. MULLEN and KRISTINA M. LEMAY and the marital community comprisedthereof, ALBERT C. HUNIU and JANE DOE HUNIU and the marital community comprised thereof,

Respondents/ Defendants

AMENDED BRIEF OF RESPONDENT SHAWN E. MULLEN DUE TO SUPPLEMENTED RECORD TO INCLUDE PREVIOUSLY UN-NUMBERED CLERK'S PAGES (SEE HIGHLIGHTED RECORD CITATIONS)

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I. INTRODUCTION

This is Respondent Mullen's response to Appellant's appeal of an order dismissing Appellant's case with prejudice on **December 1, 2014**.

This is also a cross-appeal of the court's order granting Appellant's motion on **December 19, 2014** to set aside monetary sanctions previously awarded against Appellant by a different trial court judge.

II. RESTATEMENT OF APPELLANT'S ASSIGNMENT OF ERROR

The Appellant's asserts in its Opening Brief that the trial court erred by dismissing Plaintiff Dewitt's case with prejudice. Respondent disagrees with this contention, and believes that the court made the correct ruling in dismissing this matter.

III. RESPONDENT'S ASSIGNMENT OF ERROR

The Respondent hereby asserts that the trial court erred by setting aside Monetary Sanctions previously awarded by the court, in its order of December 19, 2014.

IV. ISSUES RELATED TO APPELLANT'S ASSIGNMENT OF ERROR

1. The Trial court did properly consider and weigh all relevant factors before dismissing Plaintiff's case in its order of **December 1, 2014**, and also properly denied Plaintiff's Motion for Reconsideration in its order of **December 19, 2014**.

V. ISSUES RELATED TO RESPONDENT'S ASSIGNMENT OF ERROR

1. The trial court, in its attempt to impart 'equity', improperly reversed sanctions awarded by another trial court judge in its order of **December 19, 2014**.

a. The reversal of the previously ordered sanctions was time barred.

b. The previously awarded sanctions were within the discretion of the court, and were substantively appropriate.

2. If Appellant continues to insist, in response to this brief, that the sanctions ordered should be reversed, the court should order attorney fees and costs against Appellant and/or his counsel associated with this issue.

VI. STATEMENT OF THE CASE

A. Underlying Facts.

This appeal results from the dismissal of Appellant's (Plaintiff) personal injury lawsuit against Defendant Shawn E. Mullen, and his former spouse, Kristina Lemay. (CP 58, CP 59).

The trial court dismissed this case on the day of trial, when Plaintiff failed to appear for trial. (CP 58, CP 59). The court's order also accurately reflects that the Plaintiff failed to comply previously with multiple aspects of the case schedule. (CP 58, CP 59). Contrary to the implication in his opening brief, Plaintiff was technically unrepresented at the time of trial, as his attorney, Nigel Malden, had withdrawn on

November 14, 2014, and did not re-appear until December 8, 2014, a week after the order of dismissal. (CP 55, CP 72) Mr. Malden appeared in court on the morning of trial, but did not file a notice of appearance that morning. Rather, Mr. Malden simply made oral argument and asking the court not to dismiss the matter. (CP 72). Mr. Malden offered no substantive explanation for his client's absence on the day of trial. (Appellant's Opening Brief, page 3, line 2).

Defendants Shawn E. Mullen and Kristina M. Lemay both appeared, through counsel, and were ready and able to proceed to trial. (CP 58, CP 59). The court inquired as to the whereabouts of the Plaintiff, but, as mentioned above, counsel for Plaintiff could provide no explanation as to why he was not present for trial. (Appellant's Opening Brief, page 3, line 2). When the Plaintiff was unable to proceed to trial, and Mr. Malden (no longer formally his counsel) could not present an explanation as to his whereabouts, upon motion of counsel for Defendants LeMay and Mullen, the court dismissed the case, with prejudice. (CP. 58, CP 59). In the Court's order dismissing Defendant Mullen, the court found that Defendant Mullen (1) "is not prepared to move forward to trial" and (2) "failed to comply with the case schedule order in multiple respects". (CP 59).

Still without re-appearing in the case, Nigel Malden would file a Motion for Reconsideration of the court's order on December 5, 2014 on behalf of Plaintiff. (CP 60). In support of his Motion for Reconsideration, Plaintiff filed a declaration acknowledging that he did not wish to go to trial, and that he could not afford to hire expert witnesses (and did not have one prepared to testify). (Appellant's Opening Brief, page 5, line 6; CP 65). Plaintiff also indicated in his declaration that instead of going to trial, he wished to have the court transfer his case to arbitration. (CP 65).

As for his explanation for failing to appear prepared to go to trial, Plaintiff, in total, offered the following, in his Motion for Reconsideration:

> *"10. I am very sorry for missing my trial date and inconveniencing the court and counsel. It was not intentional.*
>
> *11 I have not been able to work since the assault. I have problems with memory and concentration, headaches, neck pain and psychological problems I was diagnosed with Post Traumatic Stress Disorder, but I cannot afford to pay for treatment*
>
> *12. I am very sorry I missed the last court date I need constant reminders since the attack. I meant no disrespect to the court or opposing counsel. If I get another chance, I will make sure it never happens again."*
>
> (CP 64)

The balance of Plaintiff's Declaration in Support of Motion for Reconsideration dealt with his explanation as to why he should not have

been sanctioned for also failing to appear to a previous motion that he had scheduled. (CP 64, CP 65).

Mr. Malden also filed a declaration in support of the Motion for Reconsideration which acknowledged that he had previously withdrawn because of a lack of communication from his client. (CP 75). Other than a brief reference to Mr. Dewitt's inability to take the case to trial, the balance of his declaration pertinent to this appeal was to explain why he believed that his client had been improperly sanctioned for failing to appear at the previous hearing back in June of 2014. (CP 64). Mr. Malden indicated that he believe that he was "*100% correct*" that his client's motion should have been "*automatically stricken*", when he failed to confirm it, and therefore it was improper for the court to sanction him when opposing counsel appeared and he did not. (CP 64).

The only other evidence of any kind submitted to support Appellant's Motion for Reconsideration was a declaration from Michael Haan, which also argued why he believed that Appellant should not have been sanctioned for failing to appear at the previously referenced hearing. (CP 61-62).

Noted for hearing on the same day, Mr. Malden also filed a "Motion to Set Aside Monetary Sanctions" from an order entered May 9, 2014, with no other supporting materials or legal authority cited within.

(CP 80-81). Respondent Mullen filed a combined response to the Motion for Reconsideration and the Motion to Set Aside Sanctions and in doing so challenged the factual and legal basis for the two motions. (CP 92-98). Appellant filed a reply to the same. (CP 102-108). No legal authority was cited in any of the materials filed in support of Appellant's Motion for Reconsideration. Similarly, no legal authority was cited in any of the materials filed in support of Appellant's Motion to Set Aside Monetary Sanctions.

B. Procedural History.

This lawsuit was a Personal Injury suit filed by Appellant on November 27, 2013, against multiple defendants. (CP 1-2). Confirmation of Service was due on December 25, 2013. (CP 138). On January 8, 2014, two weeks late, Plaintiff filed a Confirmation of Service which indicated that the sheriff's office would not serve the Defendants without charge, and that "private process servers were then engaged", but that service had not been completed. (CP 145). No subsequent confirmation of service was ever filed by Plaintiff.

The Confirmation of Joinder of Parties Claims and Defenses was due on March 26, 2014. (CP 138). Plaintiff failed to coordinate the filing of the same, and on March 31, 2014, the court sent out a notice indicating

that because the Confirmation of Joinder had not been filed, the case was out of compliance. (CP 144).

On April 7, 2014, Plaintiff filed a Confirmation of Joinder, without coordination with any of the Defendants, and indicated that he would appear in court the week of April 23, 2014 to obtain the court's direction. (CP 158)

On April 7, 2014, Plaintiff filed an Return of Service with the court, signed by Leonard M. Haan", Plaintiff's Roommate, indicating that it had served one of the Defendants, Kristina LeMay, by serving the summons and complaint on an "unknown" person at 5920 100th St. SW #25, Lakewood, WA 98499. (CP 10-11). The notes in the Return of Service indicated that service was "made in accordance with instruction for service in court records for this defendant". Id. The Lakewood address matches the street address for Ms. Lemay's former divorce attorney, so it is presumed that Plaintiff obtained this address from Ms. Lemay's divorce record in the Pierce County LINX system, and attempted to serve Ms. Lemay through her former lawyer. (CP150-151) Counsel for Defendant Mullen and counsel for Defendant LeMay were aware that Ms. Lemay had not been properly served and joined in this action at the time of the due date for the "Confirmation of Service". Plaintiff failed to coordinate a status conference to address the issue.

Plaintiff's Witness Disclosure was due on May 21, 2014. (CP 138). Plaintiff's Witness Disclosure was filed on June 16, 2014 (CP 146-147)

Joint Statement of Evidence was to be filed by October 29, 2014. (CP 138). Plaintiff failed to coordinate the same. Trial was scheduled for December 1, 2014. Id. Plaintiff failed to appear for trial.

VII. ARGUMENT

A. Standard of Review

Absent a showing of an abuse of discretion, a trial court's decision to dismiss a case on the day of trial, when Plaintiff fails to appear and is otherwise not prepared to move forward must be upheld by the appeals court, as the trial courts must be supported in their effort to move cases along and prevent undue congestion in their calendars. Wagner v. McDonald, 10 Wash. App. 213, 217-18, 516 P.2d 1051, 1054 (1973).

Similarly, the proper standard to apply in reviewing sanctions decisions is the abuse of discretion standard. Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 122 Wash. 2d 299, 338, 858 P.2d 1054, 1075 (1993).

B. Substantive Legal Authority

1. TRIAL COURT PROPERLY DISMISSED APPELLANT'S COMPLAINT, WITH PREJUDICE, WHEN HE FAILED TO APPEAR AT TRIAL READY TO PROCEED ON THE DAY OF TRIAL.

a. The Trial Court Properly Dismissed the matter pursuant to CR 40(d). On December 1, 2014, when Plaintiff failed to appear for trial in this cause, the court found that (1) Plaintiff failed to appear; (2) that Plaintiff was not prepared to move forward to trial; and (3) that Plaintiff failed to comply with the case schedule order in multiple respects, and dismissed Plaintiff's complaint with prejudice. (CP 59).

Appellant erroneously argues that the court improperly dismissed his complaint under **CR 41**, for violation of "Discovery Order". (Appellant's Opening Brief, page 8-9). While it is true that Plaintiff failed to properly respond to discovery requests as well, and while this may have been partially supportive of, or a separate basis for, the court's decision to dismiss the matter, the trial court was clearly authorized (if not mandated) to dismiss the case under **CR 40(d)**, when the Plaintiff failed to appear and proceed on the day of trial without good cause shown. (CP 59).

CR 40(d) provides as follows:

> ***"(d) Trials.*** *When a cause is set and called for trial,* ***it shall be tried or dismissed****, unless good cause is shown for a continuance.*

The court may in a proper case, and upon terms, reset the same."

(Emphasis Added)

Moreover, a court's decision to dismiss and action with prejudice is "amply justified' when a Plaintiff fails to appear on the day of trial, and the court has before it other evidence of delay caused by Plaintiff, including lack of cooperation with his own counsel (resulting in a withdrawal by counsel). Wagner v. McDonald, 10 Wash. App. 213, 217-18, 516 P.2d 1051, 1054 (1973). These precise facts are present in this case. In Wagner v. McDonald, just as in the instant case, Plaintiff's counsel in a personal injury case [also] had withdrawn prior to trial because of Plaintiff's lack of cooperation with his counsel. The trial court dismissed the case in Wagner on the day of trial.

In the instant case, Plaintiff's counsel filed a Notice of Intent to Withdrawal from this cause on November 14, 2014 (effective November 25, 2014). (CP 55). He explains that his withdrawal was due to his client "not giving him timely responses at an important juncture" (ie. Lack of cooperation with his own counsel as in Wagner). (CP 61). On December 1, 2014, the matter was called for trial and Plaintiff failed to appear. (CP 59). Plaintiff's former counsel, without filing a written Notice of [re] Appearance (required by RCW 4.28.210) appeared before the trial court and argued that while he had no explanation for his client's failure to

appear, the matter should not be dismissed, but rather should be transferred to Arbitration[1]. (Appellant's Opening Brief, page 3). No "good cause" for a continuance was even offered, let alone demonstrated to the trial court. The trial court had absolutely no factual or legal basis to continue the trial, and based on the mandatory (***shall be tried or dismissed*** *unless good cause is shown for a continuance)* language of **CR 40(d)**, would have erred as a matter of law by *not* dismissing the case.

In addition, Appellant concedes in his opening brief that he was not only not prepared for trial on the day the case was called, but that he did not even 'want' to take his case to trial[2] [at all]. Appellant's Opening Brief, page 5, paragraph 16).

b. In addition to failing to appear for trial, Appellant showed a history of failing to otherwise prosecute his case in a timely manner.

In addition to the fact that Plaintiff failed to appear at trial as outlined above, the court had before it other evidence of dilatory conduct by Appellant (aside from his attorney withdrawing for lack of cooperation

[1] For the reasons set forth below, transferring the matter to arbitration would not have been appropriate anyway.

[2] Appellant states that he cannot afford to take the case to trial, but instead believes that he is *entitled* to arbitrate the matter. (Appellant's Opening Brief, page 5, paragraphs 16 and 17)

in November of 2014). The following factors were before the court when it dismissed this case:

- Plaintiff failed to appear at trial (CP 59)
- Plaintiff failed to pay its filing fee at the time of trial
- Plaintiff failed to submit a witness and exhibit list for trial (CP 138)
- Plaintiff had not disclosed an expert witness who could testify about damages (and acknowledged on the day of trial that he would be unable to do so) (Appellant's Opening Brief, page 5; CP 138)[3]
- Plaintiff failed to coordinate a joint statement of evidence for trial (CP 138)
- Plaintiff filed its initial witness list over one month late (CP 146-147)
- Plaintiff failed to coordinate a confirmation of joinder (CP 138)
- Plaintiff failed to respond to discovery requests even after CR 26i conferences (CP 96)
- Plaintiff was ordered to pay sanctions and has failed to pay (CP 33)

[3] Plaintiff admits that it does not have funds sufficient to retain an expert witness, but argues the matter should have been transferred to arbitration. Expert witness testimony as it pertains to damages in a personal injury case is not exclusive to the trial court level. Such testimony would be necessary to prove a case for damages even if the matter was subject to mandatory arbitration. Plaintiff essentially admits he cannot prove damages, a necessary element to his case

Appellant's counsel argues that dismissal of this case was unwarranted and that the court "did not perform the proper weighing of factors" to support a dismissal. (Appellant's Opening Brief, page 10). Just as counsel offered little explanation as to why his client failed to appear for trial, counsel himself failed to explain to this court why he had been representing Plaintiff since he appeared in the case on July 16, 2014, yet failed to do anything to prosecute the case whatsoever, citing only his recent lack of communication with his client as a reason for his withdrawal[4].

Based on the above, there was more than ample evidence to support the court's dismissal of Plaintiff's complaint in this matter, and to the extent that the court wasn't mandated under **CR 40(d)** to dismiss the matter, the court clearly did not abuse its discretion, when so doing.

c. Plaintiff was not entitled to transfer of the matter to Arbitration.

i. Damages Sought by Plaintiff exceed $50,000. Plaintiff argues that the matter should have been transferred to arbitration, rather than dismissed at trial (Appellant's Opening Brief, page 3). This argument is misplaced for several reasons. First of all **MAR 1.2** and **PCMAR 1.1**

[4] It should be noted that some of the case schedule and discovery violations occurred while Plaintiff was represented by Mr. Malden, not simply when Plaintiff was handling the matter pro-se

define which cases are subject to Mandatory Arbitration. As the court is well aware, cases are subject to Mandatory Arbitration only if the amount sought by a party is under $50,000, unless the parties otherwise stipulate to Arbitration. Id. Plaintiff's complaint does not specify an amount in controversy, which in and of itself, precludes arbitration, unless Plaintiff timely files a Statement of Arbitrability, which never happened in this case.

Furthermore, Plaintiff's response to Defendant's request for statement of damages specifically indicates that Plaintiff is seeking well over $350,000. (CP 94). To this day, Plaintiff has never declared that it would only be seeking up to $50,000 at arbitration, or that he waives his right to seek damages in excess of that amount. Simply put, the matter was not subject to mandatory arbitration, and Plaintiff never offered an explanation to the trial court as to why it is.

ii. No Statement of Arbitrability was ever filed.

PCLMAR 2.1 provided in pertinent part as follows

"(a) *Statement of Arbitrability.* In every civil case, the party filing the note for trial provided by **CR 40(a)(1)** and **PCLR 40 shall**, upon the form prescribed by the court, complete a statement of arbitrability; except that a party may file a notice of arbitrability requesting arbitration at any time after filing of the complaint.

(b) *Response to Statement of Arbitrability.* Any person disagreeing with the statement of arbitrability shall serve and file a response to the statement of arbitrability on the forms prescribed by the court within 20

days of service of the summons and complaint, or 7 days after the receipt of the statement of arbitrability, whichever time is greater....

(Emphasis Added)

Even had the Plaintiff expressed an intent to waive its damage claim over $50,000 for the purposes of transferring the matter to mandatory arbitration, a statement of arbitrability was never filed under **PCLMAR 2** (even on the day of trial where Mr. Malden requested the same) and thus the procedure to determine arbitrability was never invoked.

Plaintiff's position that the matter should have been transferred to arbitration is wholly without merit and is frivolous.

d. Plaintiff submitted all of its "evidence" to support its basis for continuance of the trial for the first time in its Motion for Reconsideration, and cites absolutely no legal authority for relief on reconsideration of the original dismissal.

On December 5, 2014, Plaintiff's counsel filed and noted before the court a "Motion for Reconsideration" with the court, along with two declarations in support of that motion from the Plaintiff and his roommate[5]. (CP 60, 70, 71, 63-69, 61-62). No legal authority or analysis to support "reconsideration" was provided in any of the documents submitted on behalf of Plaintiff.

[5] There was no explanation why this was "newly discovered evidence", or why the trial court should consider this matter and under what rule it should do so.

Plaintiff filed is Motion for Reconsideration purportedly supported by **CR 59**, however, even looking at Plaintiff's 'factual' basis for relief, it is impossible to ascertain a specific legal category under **CR 59** whereby the court should even consider the requested relief.

Motions under **CR 59** may be granted for any one of the following causes materially affecting the substantial rights of such parties:

(1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial;
(2) Misconduct of prevailing party or jury; and whenever any one or more of the jurors shall have been induced to assent to any general or special verdict or to a finding on any question or questions submitted to the jury by the court, other and different from the juror's own conclusions, and arrived at by a resort to the determination of chance or lot, such misconduct may be proved by the affidavits of one or more of the jurors;
(3) Accident or surprise which ordinary prudence could not have guarded against;
(4) Newly discovered evidence, material for the party making the application, which the party could not with reasonable diligence have discovered and produced at the trial,
(5) Damages so excessive or inadequate as unmistakably to indicate that the verdict must have been the result of passion or prejudice;
(6) Error in the assessment of the amount of recovery whether too large or too small, when the action is upon a contract, or for the injury or detention of property;
(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law,
(8) Error in law occurring at the trial and objected to at the time by the party making the application; or
(9) That substantial justice has not been done.

Plaintiff did not brief, let alone give a factual basis to support relief under **CR 59** in any of its materials.

Furthermore, **CR 59(b)** requires, in pertinent part, as follows.

"A motion for a new trial or for reconsideration shall identify the specific reasons in fact and law as to each ground on which the motion is based".

In addition to Plaintiff's failure to follow the procedure for identifying the legal issues as outlined under **CR 59**, Plaintiff failed to provide any factual basis to cause the court to reverse its previous order.

In sum, in the materials submitted with Plaintiff's motion, Plaintiff essentially apologized for missing the trial date and actually acknowledged that he had no ability to proceed to trial. However, Plaintiff offered no good faith basis to support reconsideration of the trial court's prior order.

The court was proper denying Plaintiff's Motion for Reconsideration.

2. THE TRIAL COURT ERRED IN SETTING ASIDE PREVIOUSLY ORDERED SANCTIONS AGAINST PLAINTIFF.

a. Plaintiff's Motion to Set Aside Sanctions was procedurally time barred. Shortly after filing its Motion for Reconsideration, Plaintiff filed a separate "Motion to Set Aside Monetary Sanctions" ordered by a different Department of the Pierce County Superior Court on May 9, 2014. (CP 80-81). In its Motion, Plaintiff argued that he should not have been sanctioned for filing a previous motion for default and failing to appear for

that hearing, because he failed to confirm it (and therefore Defense counsel should not have appeared). Id. Plaintiff's argument that he should not have been sanctioned by Judge Serko for failing to appear to a Motion for Default which he did not confirm is based on a misstatement of a court rule, and is clearly misplaced.

Like his Motion for Reconsideration of the dismissal of the case, Plaintiff cited absolutely no legal authority for "setting aside" the previous sanctions ordered by this court back on May 9, of 2014. Again, technically, the lack of legal citation made responding to such a motion difficult.

However, the only conceivable rules under which Plaintiff could seek relief would be **CR 59** or **CR 60**, respectively, neither of which were cited, and neither of which are appropriate in this case.

With respect to **CR 59**, any motion under that rule would have had to be brought within (10) days of the order, which would have been (10) days from May 9, 2014. **CR 59(b)** (CP 33). Plaintiff's Motion was not noted before the court until December 11, 2014. (CP 82). In addition to not having substantive merit, a Motion for Reconsideration is clearly time barred.

With respect to a claim for relief under **CR 60**, Plaintiff has not citied a basis, nor complied at all with the requirements of the rule, not the

least of which would be personal service of the Motion on the Defendants. **CR 60** could not have applied to Plaintiff's motion.

Plaintiff had no procedural vehicle available to move the trial court to set aside the monetary sanctions, due to his delay in seeking relief, and therefore, on that basis alone, the trial court erred in setting aside the sanctions in its order dated December 19, 2014 (CP 115-116).

b. Plaintiff's substantive argument supporting its's motion to set aside sanctions is also misplaced.

Plaintiff's position in his motion to set aside the sanctions was that Plaintiff's own Motion for Default "should have *automatically* been stricken" for his failure to confirm it, and therefore the court should not have awarded sanctions to the Defendants when their attorneys appeared at the hearing. Simply put this argument is incorrect.

PCLR 7(a)(9) provides, in pertinent part as follows:

"The court ***may*** strike motions that are not timely confirmed". (***Emphasis added***)

Plaintiff cannot rely on a discretionary procedure to argue that Defendants should not have appeared for a hearing noted before the court[6].

[6] The undersigned also appeared at that hearing because Plaintiff also had failed to coordinate a confirmation of joinder, as required by PCLR (apparently filed one without serving it on the undersigned's office), and the undersigned believed that the court could address that issue at that hearing (had Plaintiff appeared). This is just another example of how Plaintiff failed to follow the case schedule (CP 102-108)

According to Plaintiff, Defendants should have ignored his notice of issue and motion; guessed that Plaintiff would not confirm the hearing; and then hope that Plaintiff would not appear or that the court would exercise its discretion to strike the motion. Simply put, Plaintiff should have affirmatively struck the motion, and advised counsel of the same, prior to the hearing. Plaintiff's failure to follow the court rules and show courtesy to defense counsel by communicating with them caused the expense and inconvenience of Defendants' attorneys, which was sanctioned by the court.

Plaintiff's 'after the fact' argument regarding the lack of confirmation of the hearing is simply to attempt to justify his past actions. Plaintiff's past sanctions by the court were justified, and support rather than detract from this court's decision to dismiss the case (to the extent this issue is truly material to the dismissal). In light of the clear discretionary court rule regarding striking unconfirmed motions, Plaintiff's position is frivolous.

Plaintiff's position that he should not have been sanctioned because he failed to confirm the hearing and the court "automatically" should have stricken the hearing is simply an incorrect reading of the rule,

which Plaintiff's counsel conceded in his reply to the trial court[7]. (CP 102).

In addition to the fact that Plaintiff's motion was time barred, Plaintiff had no substantive basis for requesting that sanctions be set aside, as the court did not violate any court rule or Plaintiff's due process rights. Plaintiff filed a frivolous motion causing Defendants to appear; failed to appear for it; failed to strike it, and sanctions were ordered (appropriately).

Based on the issues outlined in Section (b)(1) above, as well as argument in this section, Plaintiff's Motion to set aside previous sanctions should have been denied.

3. ATTORNEY FEES AND COSTS.

While Plaintiff's appeal cites little to no factual support, or legal authority for Plaintiff's request for a reversal of the trial court's dismissal of Plaintiff's complaint and while the same appears on its face to be frivolous, Defendant Mullen will defer to the court, on its own initiative, pursuant to **RAP 18.9(a)** and/or **RCW 4.84.185,** and counsel for Kristina Lemay on that issue. What ultimately makes this appeal frivolous is the relief that Appellant is seeking in light of his admitted desire *not* to go to

[7] Mr. Malden admits in reply to Defendant Mullen's response that the striking of non-confirmed motions is discretionary, saying that the rule "used to say" that unconfirmed motions "shall be stricken". Since the current rule does not say that, this is clear evidence that Plaintiff could not have relied on that rule when he failed to appear, and that Mr. Malden had to have created that argument sometime after that hearing to justify an attack on the order.

trial, instead preferring to proceed to arbitration. Appellant and his counsel acknowledge that he does not wish to go to trial, but are asking this court to reverse the court's order of dismissal, so that somehow Appellant can attempt to force Respondent into Mandatory Arbitration even though the case is clearly not subject to mandatory arbitration. Aside from all the other legal problems with Appellant's appeal, the ultimate result being requested by Appellant is not legally possible. Forcing multiple Respondents to have to expend attorney fees to defend an appeal on such a premise is an abuse of process, and should not be condoned by the court.

With respect to Respondent's cross appeal regarding the reversal of the trial court's ruling setting aside monetary sanctions, Respondent Mullen respectfully identifies, as required by **RAP 18.1(b)**, but reserves its request for attorney fees and costs pursuant to **RAP 18.9 and/or RCW 4.84.185**, depending on whether or not Appellant continues to advance its position with respect to the vacated sanctions, in Appellant's Response brief. Because Appellant's Motion to Set Aside Sanctions was clearly time barred; and the substantive basis (that the matter should have been stricken if not confirmed) is wholly incorrect, should Appellant continue to advance its position, rather than abandon it on appeal, this court should award sanctions against Appellant and his counsel pursuant to the above referenced respective court rules.

VIII. CONCLUSION

For the above reasons this court should:

1. Sustain the trial court's order of December 1, 2014 which dismissed this case with prejudice, and sustain that portion of its order dated December 19, 2014, which denied Plaintiff's Motion for Reconsideration of the dismissal.

2. Reverse that portion of the court's order dated December 19, 2014, which set aside sanctions ordered against Plaintiff.

3. Award Attorney fees and costs on appeal to Respondent, as this court deems appropriate, based on the arguments outlined in Section 3 above.

Respectfully submitted this 6th day of October, 2015.

MARK E. BARDWIL, WSBA #24776
Attorney for Respondent, Shawn Mullen

DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that on the date below I caused a copy of the AMENDED BRIEF OF RESPONDENT DUE TO SUPPLEMENTED RECORD TO INCLUDE PREVIOUSLY UN-NUMBERED CLERK'S PAGES, to be served on all parties or their counsel of record in the manner listed below at the addresses indicated:

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I declare under penalty of perjury under the laws of the State of Washington the foregoing is true and correct.

Dated this 6th day of October 2015, at Tacoma, Washington.

Susan G. Pierce
Legal Assistant to Mark E. Bardwil